

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6863 of 1989

With

SPECIAL CIVIL APPLICATION No. 1171 of 1995

With

SPECIAL CIVIL APPLICATION No. 10335 of 1996

With

SPECIAL CIVIL APPLICATION NO. 6670 of 1989

For Approval and Signature:

Hon'ble THE CHIEF JUSTICE MR. K.SREEDHARAN and Sd/-

MR.JUSTICE A.R.DAVE Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy of the judgement? No.
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

SOUTH GUJARAT CHAMBER OF COMMERCE & INDUSTRY

Versus

GUJARAT ELECTRICITY BOARD

Appearance:

Mr. V.B. Patel, Sr.Counsel with Mr. N.V. Anjaria and Mr. I.J. Desai, Advocate for Petitioners in SCA Nos. 6863/89, 1171/95 and 10335/96.

Mr.V.N. Bhagodia, Petitioner-in-person in SCA No.6670/89.

Mr.J.M. Thakjore, Advocate General with Mr.M.G. Doshit,

Advocate for Respondent No.1-Gujarat Electricity Board
in SCA No.6863/89.

Mr.J.M. Thakore, Advocate General with Mrs. Amee Yagnik,
Asst.Govt.Pleader with Mr. P.S. Patel, Advocate for M/s.
H.M. Bhagat and Co., for Respondent No.3 - State of Guj.
in SCA No.6863/89 and for Respondent No.1 - State of Guj.
in SCA No.6670/89, 1171/95 & 10335/96.

Mr. K.G. Vakharia, Sr.Counsel with Mr. V.H. Thakore,
Mr. S.K. Sen and Mr. M.K. Vakharia, Advocates for
Respondent No.2-Surat Electricity Company in SCA Nos.
6863/89, 6670/89, 1171/95 and 10335/96.

Mr. S.B. Vakil, Advocate for Respondent No.4 in SCA No.
6863/89.

Mr. J.M. Thakore, Advocate General with Mr. M.D. Pandya,
Advocate for Respondent No.3-Gujarat Electricity Board in
SCA Nos. 6670/89, 1171/95 and 10335/96.

CORAM : THE CHIEF JUSTICE MR. K.SREEDHARAN and

MR.JUSTICE A.R.DAVE

Date of decision: 30/03/98

C.A.V JUDGEMENT (Per K. Sreedharan, C.J.)

Issues raised in these petitions are identical. These petitions relate to the sanction given to the Surat Electricity Company (hereinafter referred to as "the Company") to distribute electrical energy within the limits of the Surat Municipal Corporation. Learned Counsel appearing on either side argued all these matters and submitted that they can be disposed of by a common judgment. They also submitted that Special Civil Application No.6863 of 1989 is to be treated as the main petition. Accordingly, we are disposing of all these petitions by this common judgment. Parties and documents are mentioned hereunder as they are arrayed and marked in Special Civil Application No.6863 of 1989.

2. Special Civil Application No. 6670 of 1989 was moved by a party in person. He has not cared to appear in Court nor was any representation made on his behalf. This Court had on 26.3.1990 ordered this petition to be heard along with Special Civil Application No.6863 of 1989. So, we are disposing of that petition as well under this common judgment.

3. The Company at its inception was generating and distributing electricity. It had its generating plant at Surat and laid distributing lines. With the industrial advancement demand of electricity rose to such an extent that the Company could not meet the demand. In the meantime, Gujarat Electricity Board (hereinafter referred to as "the Board") came into existence. The Board began generation of electrical energy. It supplied electrical energy to bulk purchasers. The Company started purchasing electrical energy from the Board. By about 1970 Company stopped generation of electricity. It continued to get electrical energy from the Board for supply to its consumers. The area of operation of the Company remained the same namely, the old city of Surat. Over the years, limits of Surat Municipal Corporation were extended on all sides. Those extended areas were not included within the field of operation of the Company. Consumers of electrical energy belonging to different classes in the extended area got supply of electrical energy from the Board, while the consumers in the old City limit continued to get electrical energy from the Company. By this arrangement some of the consumers within the limits of Surat Municipal Corporation get electrical energy from the Board and others from the Company. The Board supplies electrical energy at its own rate. The rate charged by the Company is much higher than that fixed by the Board for it passes on fuel adjustment charges to the consumers. For fixing the rates of electricity charges for different classes of consumers the Board takes into account the energy cost, amortisation, cost of laying of transmission lines and other apparatuses. The Board is statutorily required to earn not less than 3% surplus over the expenses in generating and transmission. The Company supplies electrical energy to the consumers. According to the petitioners, they levy fuel adjustment charges as well. When that is added to the cost sales-tax also goes up. Thus, consumers of electrical energy supplied by the Company have to pay higher rates. Consumers of electrical energy, it is argued, form one class. They must be treated alike. They can be charged at only one rate. Depending on the supplier of electrical energy its cost cannot vary. On these grounds petitioners claim that the residents within the limits of Surat Municipal Corporation are entitled to equal treatment in relation to the supply of electrical energy and rates recoverable from them. Consumers who get electrical energy from the Company must be treated in the same manner as consumers who get electrical energy from the Board.

4. The Company got licence to supply electrical energy at the time when it was generating electrical energy. That licence was terminated in 1968. Thereafter the Company was not a licensee. It was only a sanction holder as contemplated by Section 28 of the Indian Electricity Act, 1910 (hereinafter referred to as "1910 Act"). After the amendment of 1910 Act and the Electricity (Supply) Act, 1948 (hereinafter referred to as "1948 Act") this Company cannot continue as sanction holder or as licensee for it has become a generating company, because one of the objects of the Company is to generate electricity. It is also the petitioners' contention that if the Company is to be treated as a sanction holder when sanction was accorded in 1978 or thereafter consent of the Surat Municipal Corporation was not obtained and so, Company cannot be treated as sanction holder or licensee. On account of these legal infirmities, permission granted to the Company to supply electrical energy to consumers within the Municipal limits of Surat is to be interfered with. On these grounds the petitioners pray for directing the Company to levy charges on electricity at the same rate as levied by the Board from its consumers, to direct the Company to refund the excess charges levied from the consumers, to direct the Board to supply electrical energy to the Company without including fuel adjustment charges and sales-tax, to direct the State Government to order the Board to supply electrical energy to the consumers without levying fuel adjustment charges, to direct the Board to supply electrical energy to consumers within the area of operation of its licensees, to direct the Board to acquire and take over the Company and to declare the Notifications dated 11.5.1981 and 2.7.1997 under which the Company is given right to supply electrical energy upto 2028 as unlawful and illegal.

5. Special Civil Application No. 6863 of 1989 has been filed as a public interest litigation. Petitioners prayed for publication of notice under Order-I Rule 8 of the C.P.C. to make the petition a representative one. That permission was granted and Notification was issued. Petitioners are consumers of electrical energy supplied by the Company. They belong to different categories. First petitioner is South Gujarat Chamber of Commerce and Industry, a registered association. Second petitioner belongs to the category of residential-domestic consumer. Third petitioner is a commercial and low tension consumer while fourth petitioner is a high tension consumer. They are getting electrical energy through the Company and they are located within the original Municipal limits of Surat. Outside municipal limits electricity is supplied

by the Board to consumers. Consumers in that area, whether domestic, low tension or high tension, get electrical energy at different rates fixed by the Board. Petitioners want the same rate to be made applicable to the electrical energy consumed by them. Can such a relief be given by this Court in exercise of the powers under Article 226 of the Constitution of India? Answer to this can only be in the negative. It is settled law that the mechanics of price fixation has necessarily to be left to the judgment of the executives (vide Constitution Bench decision in the case of Prag Ice and Oil Mills v. Union of India, AIR 1978 SC 1296). Speaking on behalf of another Constitution Bench of the Apex Court, Justice T.K. Thommen observed (1990(3) SCC 223) "Judicial review is not concerned with matters of economic policy. The Court does not substitute its judgment for that of the Legislature or its agents as to matters within the province of either. The court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land." From the above mentioned decisions and a galaxy of other decisions of various Courts it can safely be concluded that price fixation is not within the province of the Court. The Court has only to examine whether there is a rationale basis for the fixation of the price. In the instant case objection raised by the petitioners is that while fixing the rate fuel adjustment charges are included and consequently the Company levies a higher rate. Section 46(6) of the 1948 Act specifically allows adjustment of price chargeable from the consumer having regard to the cost of fuel. The inclusion of fuel adjustment charge in fixing the tariff is statutorily permitted. Further, consumers situated in various localities getting electrical energy from different suppliers cannot object to different tariff on the ground of violation of equality provision under Article 14 of the Constitution. Different classes of consumers situated in different areas getting electrical energy from different agencies do not belong to same class to be treated similarly. It is settled proposition that unlike cannot be treated alike. So, we find no merit in the argument that consumers of electrical energy are to be treated alike and they must be charged at the same rate.

6. As stated earlier, to begin with the Company was generating electricity. In 1970 it stopped generation of electrical energy. Thereafter the Company is purchasing electrical energy from the Board for supply to its consumers. The company was granted licence in 1918. Right of the Government to purchase the undertaking of the Company was to be exercised on the expiry of 50 years from the date of licence. In pursuance of that term of the licence the Board issued a notice one year prior to the expiry of that 50 year period. On the expiry of that term, without purchasing the undertaking of the Company the Govt. by Notification dated 8.4.1968 accorded sanction to the Company to engage in the business of supplying electrical energy to the public. As per that Notification the sanction was to be in force for a period of 10 years from 12.4.1968. While the sanction was so continued, the Govt. by Notifications dated 12.3.1975 and 14.5.1975 extended the sanction for a period upto 11.4.1988 with an option to the Board to acquire the undertaking of the Company by giving 12 months' notice after 11th April 1985. While the Company was functioning as sanction holder pursuant to the above Notifications, Govt. of Gujarat issued Notification dated 11.5.1981 stating that the sanction will continue for a period of 30 years from 12.4.1968 subject to the condition that at any time before the expiry of that period, but not earlier to 11th April 1996 the Board shall choose to purchase the undertaking of the Company after giving one year's notice. Thus, the Company was given sanction to supply electrical energy to the public in Surat upto 11.4.1998. As stated in that Notification, the Board did not exercise option to purchase the undertaking of the Company within the time limit fixed as per Notification dated 11.5.1981. On 2.7.1997 the Govt. extended the sanction granted to the Company for a further period of 30 years from 12th April 1998. As per that Notification the Company has to set up its own generating capacity within a period of three years. The Board was given option to purchase the undertaking of the Company after giving one year's notice subsequent to 11th April 2026. The grant of this sanction and its extension are under challenge.

7. It is common case that the Company was granted licence to begin with for generating electrical energy and to supply it to the consumers within the limits of Surat Municipal Corporation. As per the licence Govt. was having right to exercise an option to purchase the undertaking of the Company. The Board issued a notice on 3.4.1967 to purchase the undertaking of the Company. Pursuant to that notice the Board did not purchase the

undertaking. The parties agreed to revoke the licence. With effect from 12.4.1968 the Company was allowed to carry on the supply of electrical energy to consumers as sanction holder contemplated by Section 28 of the 1910 Act. The Notification under which sanction was accorded to the Company specifically mentioned that rights and duties of the Company are as provided by the Acts of 1910 and 1948.

8. Under Section 28 of the 1910 Act, when Govt. accords sanction to engage in the business of supply of energy to the public the State Govt. has to consult the State Electricity Board and should obtain consent of the Local Authority constituted for that area. In the instant case when sanction was accorded to the Company to supply electrical energy to the public, consent of the Municipal Authority was obtained at the first instance, namely 1968. Thereafter when the period was extended to 1988 or 1998 or upto April 2028 consent of the Local Authority was not obtained and, therefore, the sanction given to the Company is contrary to the statute and has to be struck down, it is argued.

9. On going through the Scheme of 1910 Act, it can be seen that licence granted under Section 3 or the permission granted under Section 28 of that Act to a non-licensee is not for any fixed period. The licence granted under Section 3 can be revoked or amended, but it is not to expire on efflux of time. While granting licence the State Electricity Board or the State Government, as the case may be, can provide for exercising option to purchase the undertaking of the company. Such right to exercise the option must be after a lapse of considerable period. It is to safeguard the interest of the licensee, who invests huge amount for generating electrical energy and for its supply. Government or the State Electricity Board has to exercise the right of option to purchase the undertaking of the company by issuing written notice one year prior to the expiry of the said period. When such a notice is issued, it will be open to the Board or the Government, as the case may be, to purchase the undertaking of the company. No provision is made under the 1910 Act regarding the circumstances where right of option is not so exercised by the Board. In case the right is exercised by the Board, then the licensee is bound to surrender the undertaking on getting compensation, to be fixed as provided in the Act. Same is the position as far as the sanction holder is concerned. Sanction holder shall engage in the business of supply of energy to the public in accordance with the terms and conditions as the Govt.

may fix while granting sanction. Once the sanction is granted, right of the Board to purchase the undertaking of the Company can be provided therein. As per the 1910 Act sanction is not for a specific period. Once the sanction is granted, the Board can reserve its right to exercise option to purchase the undertaking of the company after specified period. Fixation of that period for exercise of option, it appears, has nothing to do with the duration of the sanction. In other words, licence granted under the 1910 Act or the sanction given under Section 28 of that Act stand virtually on the same footing.

10. Section 2(6) of the 1948 Act defines "licensee" as a person licensed under Part-II of the 1910 Act or a person who has obtained sanction under section 28 of that Act. This definition of licensee must have overriding effect as against the meaning of that term seen in the 1910 Act. This is so enacted in Section 70 of 1948 Act. Thus, a sanction holder under Section 28 of the 1910 Act is for all legal purposes entitled to all the rights and privileges as a licensee under the 1910 Act. The sanction obtained by him is not for any limited period. While according sanction right to exercise option to purchase can be reserved with the Electricity Board. That right reserved must be exercised within a particular period. The period so prescribed can be postponed by subsequent notifications. When that period is so postponed, it can under no circumstance be considered as grant of fresh sanction. While issuing the Notifications of 8th April 1968, 12th March 1975, 11th May 1981 or 2nd July 1997 the Govt. were not granting fresh sanction to the Company, but was postponing the period within which the State Electricity Board was to exercise option to purchase the undertaking of the Company.

11. While granting sanction to the Company to supply electrical energy to the consumers, it is common case, Govt. obtained the consent from the Municipal Authority. Right of the Board to exercise the option to purchase the undertaking of the Company was to be exercised within ten years therefrom. That right was being extended. It has not in any manner interfered with the sanction already granted to the Company. Viewed in that light we do not find any merit in the argument that in 1988 and 1998 consent of the Surat Municipal Corporation should have been obtained by the Government. In none of the Notifications mentioned above fresh sanction was dealt with. It was only postponing the period within which the Board was to exercise option to purchase the undertaking of the Company.

12. As stated earlier, while granting sanction to the Company for supplying electrical energy to the public, Govt. had obtained consent of the Surat Municipal Corporation. This fact is admitted on all sides. Pursuant to the consent Notification dated 8.4.1968 was issued. It contained clause for purchase of undertaking. Clause 13 of that Notification reads:

"The Sanction hereby granted shall remain in force for period of ten years from the date of its commencement, viz. 12th April, 1968, subject however to the condition that at any time before the expiry of the said period but not earlier than the expiry of the said period of five years from the date of commencement of this Sanction, it shall be competent for the Gujarat Electricity Board, if it so chooses to purchase the undertaking of the Company after giving one year's notice.

In the event of the Gujarat Electricity Board not purchasing the undertaking as aforesaid, then on the expiry of the period of ten years as aforesaid or on earlier termination of the Sanction, the Gujarat Electricity Board shall purchase the undertaking pursuant to the Agreement dated the 28th March, 1968 concluded by the Board and the Surat Electricity Company Limited, on payment of purchase price as provided in the Agreement.

Provided that nothing contained in the said Agreement shall be deemed to effect any rights of Govt."

13. Agreement dated 28.3.1968 mentioned therein stated that licence granted earlier will expire and cease to be operative on and from 12.4.1968. That is the date on which initial period of 50 years was to expire under the licence. That period was fixed for Govt. to exercise option for purchase. It is only on such situation, as agreed to between the Company, Board and Govt. sanction was given to the Company under Section 28 of the 1910 Act. During the period of continuance of the sanction Govt. by Notifications dated 12.3.1975 and 14.5.1975 extended the sanction for a further period upto 11.4.1988 reserving the right to the Board to exercise option to acquire the undertaking of the Company by giving 12 months' notice after 11.4.1985.

Government issued Notification dated 11.5.1981.
By this Clause 13 in the earlier Notification was substituted by:

"The sanction hereby granted shall remain in force for a period of thirty years from the date of its commencement viz. 12th April, 1968 subject however to the condition that at any time before the expiry of this period, but not earlier than 11th April, 1996 it shall be competent for the Gujarat Electricity Board, if it so chooses to purchase the undertaking of the company after giving one year's notice.

In the event of the Gujarat Electricity Board not purchasing the undertaking as aforesaid, then on the expiry of the period of thirty years as aforesaid or on earlier termination of the Sanction, the Gujarat Electricity Board shall purchase the undertaking pursuant to the Agreement dated 28th March, 1968 read with Supplemental Agreement dated the 4th May, 1972, 22nd June 1975 and 25th May 1981 concluded by the Gujarat Electricity Board and the Surat Electricity Co.Limited on payment of purchase price as provided in the agreement. Provided that nothing contained in the agreement shall be deemed to effect any rights of Government."

14. Thus the right of the Board to exercise its option was postponed to a date later than 11.4.1996. By Notification dated 2.7.1997 the period mentioned in earlier notifications was changed by the following provision:

"In the event of the Gujarat Electricity Board not purchasing the undertaking as aforesaid, then on the expiry of the period of thirty years aforesaid, or on earlier termination of the sanction, the Gujarat Electricity Board shall purchase the undertaking pursuant to the Agreement dated the 28th March, 1968 read with Supplementary Agreements dated the 4th May, 1972, 22nd June 1975 and May, 1981 concluded by the Gujarat Electricity Board and the Surat Electricity Co.Ltd. on payment of purchase price as provided in the agreement provided that nothing contained in the above said agreement

shall be deemed to effect any rights of Government."

15. All the above notifications were published in the State Gazette. Copies were marked to the Surat Municipal Corporation. This is proof positive of the fact that Surat Municipal Corporation was informed of the extension of the periods during which the Company was to supply electrical energy to the public and the postponement of the right of the Board to exercise its option to purchase the undertaking of the Company. It is worthwhile to note that the Corporation did not raise any objection to the extensions. Nor did it come forward to purchase the undertaking of the Company as provided by the Acts. Petitioners are not to question the validity of the notifications mentioned above. According to us, petitioners' challenge against the notifications on the ground of the alleged failure of the Govt. in getting consent from the Surat Municipal Corporation is devoid of any substance and we over rule the same.

16. Learned counsel representing the petitioners advanced an argument that sanction under Section 28 of the 1910 Act can only be ad hoc, temporary or stopgap arrangement. In support of this argument reliance was placed on a decision of the Apex Court in the case of Okara Electric Supply Co.Ltd. and another v. The State of Punjab and another (AIR 1960 SC 284). In that case question that arose was whether the company whose undertaking was sought to be purchased by the Government has right to oppose the claim of the State. While upholding the right of the Government to purchase the undertaking of the company Their Lordships observed "There is no doubt that the grant of sanction contemplated by S.28 cannot be permanent. It was always bound to be temporary, issued on an ad hoc basis according to the requirement of each case, and when granting sanction for a specific number of years it is in the interest of the grantee himself that some provision should be made for payment of compensation to him in respect of the investment made by him in carrying out the business of supplying energy when otherwise it would be difficult for him to collect his assets in that behalf." First of all it must be noticed that Their Lordships were concerned with unamended Section 28 of the 1910 Act. By the amendment sanction is to the business of supplying energy to the public. When the interest of the public is involved, the sanction holder must have a long term. If it is only for a temporary period it will adversely affect the interest of the sanction holder and the public

who are getting benefit of supply of electrical energy. So, the observation made in the said decision has to be understood with reference to the facts decided therein.

17. In the case of Gujarat Electricity Board v. Shantilal R. Desai (AIR 1969 SC 239) Their Lordships took the view that exercise of option to purchase as well as electing to purchase is one integral part and not two independent steps taken by the Electricity Board. Thereafter Their Lordships proceeded to state that the Electricity Board can either decide to purchase the undertaking or renew the licence on the expiration of the period for which the licence is granted. On the basis of this observation it was contended that the sanction granted in 1968 was for a period of ten years and thereafter it was mandatory for the Govt. to extend the sanction. We are not in a position to agree with this contention for neither the licence granted under Part-II of the 1910 Act nor the sanction granted under Section 28 therein, is for a term which expires requiring renewal. This view is supported by the decision of the Apex Court in the case of Godhra Electricity Company v. State of Gujarat (AIR 1975 SC 32). After referring to the decision in AIR 1969 SC 239, Their Lordships took the view that the option to purchase was to be exercised within the period mentioned therein and that period has no reference to the term of the licence.

18. Another argument advanced by the learned counsel representing the petitioners is that the Company is now a generating company. A generating company cannot be a licensee or a sanction holder. So, in that view of the matter the supply of electrical energy by it in the local limits of the Surat Municipal Corporation is not permissible. According to the learned counsel, Section 2(6) of the 1948 Act while defining "licensee" it specifically excludes from within its ambit a generating company. A generating company has been defined under Section 2(4A) of the 1948 Act as one registered under the Companies Act, 1956, and which has among its objects establishment, operation and maintenance of generating stations. One of the objects of the Company is to establish generating stations. So, it is beyond doubt that the Company is a generating company. Being a generating company it will be outside the purview of the definition of the term "licensee". In the case of generating company Section 26A of the 1948 Act will apply. As per Clause (i) of Section 26A, a generating company does not require a licence under the 1910 Act or obtain sanction from the Government under that Act for carrying on its activities. Clause (ii) of Section 26A

deals with the rights and privileges of a generating company. As per that provision which was incorporated by the Amending Act of 1991, the company's rights and privileges are controlled. None has got a case that the Company is acting in violation of the provisions contained in Section 26A and the terms incorporated in the notification whereby sanction was granted by the Government.

19. No argument has been advanced before us contending that the rate fixed for electrical energy supplied by the Company is in violation of the provisions contained in 1910 Act or Schedule-VI attached to it or in violation of the provisions contained in 1948 Act.

20. In view of what has been stated above, we do not find any merit in these petitions. They are accordingly dismissed.

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